

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF TEXAS
3 HOUSTON DIVISION
4 THOMAS WHITAKER, et. al., .
5 Plaintiffs, . Civil Action
6 VS. . No. H-13-CV-2901
7 BRAD LIVINGSTON, et. al., . Houston, Texas
8 . September 4, 2015
9 Defendants. . 9:44 a.m.
10
11 TRANSCRIPT OF PROCEEDINGS
12 BEFORE THE HONORABLE LYNN N. HUGHES
13 HEARING
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PROCEEDINGS RECORDED BY STENOGRAPHIC MEANS,
TRANSCRIPT PRODUCED FROM COMPUTER-AIDED TRANSCRIPTION

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(continued)

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1 PROCEEDINGS

2 September 4, 2015

3 THE COURT: Good morning.

4 MS. STRATTON: Good morning.

09:43:54 5 MR. OTTOWAY: Good morning.

6 THE COURT: What is the precise status of

7 Mr. Williams' execution schedule?

8 MR. OTTOWAY: Your Honor --

9 MS. STRATTON: Your Honor, I mean, I suppose either of
09:44:17 10 us can go. The Court ordered that the previously pending date
11 of September 29th is no longer effective. I'm using the wrong
12 words; but as of this morning, unless Mr. Ottoway tells us
13 different, the State has not sought another date to reset his
14 execution.

09:44:38 15 THE COURT: Why doesn't -- he should know, shouldn't
16 he?

17 MS. STRATTON: I haven't asked him before we started
18 the hearing, so I don't know.

19 THE COURT: Do you know what you're doing?

09:44:48 20 MR. OTTOWAY: I do, your Honor.

21 THE COURT: That's the first question.

22 MR. OTTOWAY: No. I will say for purposes of setting
23 execution dates, that's entirely controlled by the District
24 Attorney's Offices.

09:44:59 25 THE COURT: Who is a State officer.

1 MR. OTTOWAY: You're absolutely right, your Honor.
2 And currently, there is no execution date. There has been no
3 attempt to set a new execution date. The execution order and
4 warrant have been withdrawn entirely.

09:45:15

5 THE COURT: All right. Is there a plan underlying
6 this or are these just random occurrences by the great State of
7 Texas?

09:45:36

8 MR. OTTOWAY: Your Honor, I believe that when it was
9 discovered that an attorney may have been representing him
10 disclosed that he, indeed, was not representing Mr. Williams,
11 that is when the State moved to appoint Mr. Williams an attorney
12 for purposes of any additional post-conviction litigation he
13 might have; and at that time, we moved for appointment; and that
14 is the reason why it was withdrawn, your Honor.

09:45:57

15 THE COURT: All right. Who appointed the counsel?

16 MR. OTTOWAY: I believe it was Judge Gilmore, your
17 Honor.

18 THE COURT: Wait a minute.

19 MS. LEVIN: If I may, your Honor?

09:46:13

20 THE COURT: Ms. Stratton is taking the lead for a
21 moment.

22 Do you know what happened downstairs?

09:46:26

23 MS. STRATTON: My understanding -- Ms. Levin attended
24 the teleconference of the hearing. I was not personally
25 present. My understanding is that counsel was not appointed at

1 that time.

2 THE COURT: I don't know -- I'm not questioning her
3 about it. I don't know how Judge Gilmore can appoint a lawyer
4 in a closed case.

09:46:43 5 MS. STRATTON: And I think that's why an attorney was
6 not appointed. That's my understanding.

7 No? Okay.

8 Ms. Levin is shaking her head at me so I'd like
9 to ask her if she can answer the Court's question, if you --

09:46:58 10 THE COURT: Yes, ma'am.

11 MS. LEVIN: A correction to Mr. Ottoway's statement --

12 THE COURT: No, ma'am. Tell me the facts and don't
13 talk about him. He's funny looking and not prepared.

14 MS. LEVIN: Mr. Williams was without counsel, has --

09:47:11 15 THE COURT: Ma'am, is there a new counsel appointed;
16 and if so, by whom?

17 MS. LEVIN: Yesterday, Judge Gilmore appointed Seth
18 Kretzer.

19 THE COURT: And is he here in Houston?

09:47:28 20 MS. LEVIN: No, your Honor.

21 THE COURT: Where is he?

22 MS. LEVIN: I don't know.

23 THE COURT: I think my staff has just gone to find
24 out.

09:48:08 25 Mr. Williams has been getting all the attention.

1 Is there currently a date in the offing for Mr. Whitaker?

2 MR. OTTOWAY: Your Honor, I am counsel for Respondent
3 in Mr. Whitaker's federal habeas case. Currently, he has a
4 59(e) motion pending. So, there is no date at all.

09:48:30 5 THE COURT: When you say 59(e)?

6 MR. OTTOWAY: A Rule 59(e) motion, your Honor. I'm
7 sorry, a motion for new --

8 THE COURT: Motion for new trial.

9 MR. OTTOWAY: Yes, your Honor.

09:48:41 10 THE COURT: Just say that.

11 MR. OTTOWAY: I apologize.

12 THE COURT: You talk like a bankruptcy lawyer.

13 Chapter 7, Rule 46B.00A4(a). Is it the State's position that
14 the date will not be set until that's ruled upon?

09:49:04 15 MR. OTTOWAY: Your Honor, my understanding of the
16 policy of Harris County with respect to setting dates is,
17 typically, all Supreme Court litigation ceases from the federal
18 habeas proceeding before they seek to set a date.

19 THE COURT: And where does Whitaker's petition for a
09:49:28 20 habeas corpus lie?

21 MR. OTTOWAY: With respect to Mr. Whitaker, the motion
22 for new trial is currently pending, so he has not even made it
23 to the Fifth Circuit for purposes of a certificate of
24 appealability, your Honor. So, he has the Fifth Circuit and
09:49:48 25 then the Supreme Court.

1 THE COURT: What judge has it?

2 MR. OTTOWAY: Judge Ellison, I believe, your Honor.

3 THE COURT: All right.

4 Ms. Stratton, I have a list of things I want to
09:50:16 5 discuss. What would you like to discuss?

6 MS. STRATTON: Your Honor, we have a couple of
7 discovery issues.

8 THE COURT: Would you come up here?

9 MS. STRATTON: Yes.

09:50:30 10 THE COURT: Ms. Feltz is trying to hear all this, and
11 it works better in a big room if she can hear you.

12 MS. STRATTON: Okay. We have --

13 THE COURT: Lower. Lower.

14 MS. STRATTON: -- a couple of -- can you see me now?

09:50:44 15 Okay. I'm not very tall. There is a couple of
16 outstanding discovery issues that we would like to bring to the
17 Court's attention. We also want to talk about the status of the
18 current complaint following the Glossip opinion, and we need to
19 talk about scheduling. Those are what are on my short list.

09:51:06 20 THE COURT: All right. What sort of discovery are we
21 going to talk about?

22 MS. STRATTON: Pursuant to your last order, I sent a
23 letter requesting particular factual information to Mr. Ottoway.
24 They responded. We had a discovery conference, agreed to
09:51:23 25 disagree on a couple of items; and there are a couple of items

1 that we wanted to bring to the Court's attention for a ruling.

2 THE COURT: What is number one --

3 MS. STRATTON: Number one --

4 THE COURT: -- preferably in the order of

09:51:38 5 significance, not in the order of you happened to write them
6 down?

7 MS. STRATTON: In the order of significance, I would
8 say number one and two are pretty close, first and second. So,
9 the first item is every compounding pharmacy, when they prepare
09:52:01 10 a particular drug, has what's called a master formulation
11 record.

12 In response to the Court's order, when the
13 Defendants disclosed the formula for the compounded
14 pentobarbital, what they provided in their pleading was a subset
09:52:17 15 of the master formulation record. We would like to see an
16 appropriately redacted copy of the formulation record itself.

17 And Mr. Ottoway has told me that the pharmacy
18 will not produce it because it's proprietary.

19 THE COURT: I think somebody needs to look at it.

09:52:51 20 MS. STRATTON: Dr. Ruble would most certainly like to
21 look at it.

22 THE COURT: Not my first choice for a disinterested
23 person.

24 MS. STRATTON: Oh, in terms of discoverability,
09:53:06 25 understood, your Honor.

1 THE COURT: You know, I don't want their names on
2 stuff. I don't want their trade secrets out. I take it your
3 pharmacological knowledge is limited?

4 MS. STRATTON: That is correct, your Honor.

09:53:24

5 THE COURT: Ms. Hinkie, did you take organic
6 chemistry?

7 MS. HINKIE: I did not, your Honor. That's why I went
8 to law school.

09:53:38

9 THE COURT: Most people who do apparently take it
10 twice, as I understand -- I didn't either.

11 Let me think about that.

12 MS. STRATTON: Okay.

13 THE COURT: What's number two and half or --

09:53:54

14 MS. STRATTON: Number two and half is in the -- I
15 forget which response it was. Oh, the same response to the case
16 management order. The Defendants disclosed the means to get the
17 batch of drugs from the pharmacy to the prison. In there, they
18 disclosed that it's taken by air-conditioned vehicle from the
19 pharmacy to the prison.

09:54:18

20 And I asked for the time that it's in the car
21 because the time that the drug is not in cold temperature
22 affects the degradation. And they told me they wouldn't tell me
23 what it was because that would --

24 THE COURT: It would reveal the speed the driver --

09:54:43

25 MS. STRATTON: -- narrow -- I did not ask at what

1 speed he was -- the driver was driving.

2 THE COURT: If you have the time, you can work
3 backwards.

4 MS. STRATTON: And their concern was that it would be
09:54:54 5 able to narrow down the possibility -- the possible number of
6 pharmacies. I then asked if we could get a range, you know,
7 that maybe not -- wouldn't disclose to me is it in Dallas or
8 Houston, you know, or whatever; and they still thought that that
9 was not appropriate.

09:55:13 10 THE COURT: Mr. Ottoway, they pick it up, put it in an
11 air-conditioned car, and drive it?

12 MR. OTTOWAY: That is correct, your Honor.

13 THE COURT: And when they stop in Denver on the way
14 back overnight, do they put it in the motel room that is air
09:55:41 15 conditioned?

16 MR. OTTOWAY: I cannot speak to the location where
17 they obtain it, your Honor.

18 THE COURT: I understand that. I'm assuming that -- I
19 invented Denver so you wouldn't --

09:55:51 20 MR. OTTOWAY: Your Honor, I believe we've disclosed
21 that we obtain it in state.

22 THE COURT: Maybe the driver's not good and he goes --
23 so, you do not believe that there is an overnight rest?

24 MR. OTTOWAY: Oh, there was another request and they
09:56:12 25 asked whether there was any other stops, I believe. That was

1 one of the requests in your discovery letter, and we disclosed
2 that there was a short stop for food.

3 MS. STRATTON: That's correct.

4 THE COURT: Okay, that's enough.

09:56:31 5 MS. STRATTON: That's enough for me to know? I mean,
6 you're denying my request to have them answer the question?

7 THE COURT: Yes, ma'am. And that actually bleeds into
8 one of my topics.

9 MS. STRATTON: Okay. And then, my third item on the
09:56:47 10 list was we had asked for a copy of what's called a certificate
11 of analysis. The certificate of analysis is a report from the
12 compounded pharmacy about, amongst other things, the purity of
13 the API that is used to make the drug.

14 THE COURT: I thought we had covered that.

09:57:10 15 MS. STRATTON: It's not the same thing as the master
16 formulation record.

17 THE COURT: No. But there is a post-compounding
18 analysis test of the drug.

19 MS. STRATTON: That's correct.

09:57:30 20 THE COURT: And if the principal ingredient were
21 defective before it was compounded, it would be defective after
22 -- even Ruble says that. That's why the insistence on going
23 further and further back makes no sense.

24 If, after they liquify the drug, they test it and
09:58:00 25 if the active ingredient is good then, that's the only question

1 that we have to worry about.

2 MS. STRATTON: I know I'm not going to articulate
3 myself very well. Dr. Ruble has explained to me there's more to
4 it than that. But it's not quite that simple but --

09:58:17 5 THE COURT: He is not that articulate because, having
6 read his reports multiple times, it does not follow.

7 MS. STRATTON: Fair enough. Those were the only
8 outstanding discovery items that we could not agree on, your
9 Honor.

09:58:41 10 THE COURT: Well, there's one you forgot to ask.

11 MS. STRATTON: Which was that?

12 THE COURT: The age of the pentobarbital injectable --
13 that's good English. Is that good English?

14 MS. STRATTON: You're correct, your Honor.

09:59:02 15 THE COURT: -- the compound.

16 MS. STRATTON: We didn't ask that question. And
17 partly, the reason they didn't ask that question was because of
18 the Court's previous ruling on the date of the Eagle Labs
19 report. But --

09:59:16 20 THE COURT: No, wait. This is a different problem.

21 MS. STRATTON: Okay.

22 THE COURT: I would like Texas to disclose the data
23 compounding for the 18 historic injections. We know the
24 consequences of those injections.

09:59:44 25 MR. OTTOWAY: If I may, your Honor, are we talking

1 about injections that we've used previously from compounding
2 pharmacies?

3 THE COURT: I thought -- there are eight? I thought
4 there were 18.

09:59:55 5 MR. OTTOWAY: I was only confused. I believe there's
6 more than that.

7 MS. STRATTON: I believe it's 24.

8 MR. OTTOWAY: I believe it's 26.

9 MS. STRATTON: Oh. It's at least in the twenties.

10:00:07 10 MR. OTTOWAY: I wanted to just clarify, your Honor.

11 THE COURT: Yes. I have a table somewhere. But
12 what's not on the table is the length of time from compounding
13 to injection; and I think, since we have some real data as
14 opposed to hypotheses, let's get the operating data.

10:00:28 15 MR. OTTOWAY: Your Honor, would you allow me to --

16 THE COURT: 26?

17 MS. STRATTON: 24 or 26.

18 MR. OTTOWAY: 26, I believe, your Honor.

19 THE COURT: All of them.

10:00:41 20 MR. OTTOWAY: If you want to finish with Ms. Stratton
21 first, I do have some objections with respect to any further
22 disclosures on that, if you would like to entertain those now
23 or --

24 THE COURT: You're objecting to my discovery request?

10:00:56 25 MR. OTTOWAY: Well, I have an alternative process that

1 I would like to explore with the Court as far as this particular
2 case.

3 THE COURT: All right. But partially, I'm trying to
4 solve the problem globally because -- were you here last time?

10:01:17 5 MR. OTTOWAY: I was not, your Honor.

6 THE COURT: Well, I think Ms. Stratton and I agreed
7 that there's no acceptable answer.

8 Didn't we?

9 MS. STRATTON: I think so.

10:01:28 10 THE COURT: And so, if I can lay the groundwork for
11 clarity and some precision with historic data, it might help
12 people like Ms. Stratton formulate a better strategy or a
13 completely different one and save other judges and lawyers for
14 the State going through the process of figuring out exactly what
10:01:55 15 we've been doing and how we've been doing it.

16 MR. OTTOWAY: Certainly understand, your Honor.
17 However --

18 THE COURT: All right. Is that it on discovery?

19 MS. STRATTON: For me it is, your Honor.

10:02:04 20 THE COURT: Okay. Let me see what he's talking about.

21 MS. STRATTON: Yes, sir.

22 MR. OTTOWAY: Well, your Honor, the alternative
23 process is I believe we filed an advisory requesting Plaintiffs
24 to file an alternative proposal for purposes of meeting the full
10:02:25 25 pleading requirements of Baze and Glossip. And at the point --

1 THE COURT: You were on Law Review, weren't you?

2 MR. OTTOWAY: I was not, your Honor.

3 THE COURT: Really? Well, you must be struggling to
4 overcome --

10:02:38 5 MR. OTTOWAY: I'm primarily an appellate attorney,
6 your Honor.

7 THE COURT: All right. Tell me the rule and don't
8 tell me the name of the guy or the Court where it happened. I
9 just need for you to tell me what you want is for the Plaintiffs
10:02:56 10 to plead what?

11 MR. OTTOWAY: Actually, I don't need the Plaintiff to
12 plead anything. I think they finished their pleadings when they
13 responded to your order requiring them to provide a proposed
14 alternative. Because that finalized their pleading, I think
10:03:14 15 that was a functional amendment; and I would like the ability to
16 file a dispositive pleading in response to the entirety of their
17 complaint with the amendment. So, that would dispose of any --

18 THE COURT: Well, you can file any dispositive motion
19 you want, I guess. But apparently, there's some thought that a
10:03:38 20 recent Supreme Court case has created a new opening. I read it
21 and don't think it affects this. But --

22 MR. OTTOWAY: I agree with you, your Honor.

23 THE COURT: -- I don't see any harm in letting
24 Whitaker restate his view of an alternative approach. At least
10:04:11 25 legally, the facts should be about the same, shouldn't they?

1 MS. STRATTON: Yes, your Honor.

2 MR. OTTOWAY: And I'm unopposed to an amended
3 complaint -- a second amended, I believe.

4 THE COURT: Third or fourth.

10:04:22 5 MR. OTTOWAY: And if they finalize it, then it would
6 provide me an opportunity to see whether this would be
7 appropriate for a motion to dismiss and there would be no issues
8 with respect to discovery if, indeed, granted by the Court. I
9 think with the additional time that we have, that might be a
10:04:42 10 more appropriate procedural step, your Honor.

11 THE COURT: Well, since I don't know what Williams is
12 going to say about that recent Supreme Court decision, I can't
13 decide whether it makes any sense to let him do it. That's one
14 of the troubles with -- you know, and ordinarily, I'm not crazy
10:05:08 15 about multiple amended complaints. That's kind of
16 old-fashioned. I think you ought to put everything in the first
17 one.

18 But in today's practice in no field of law,
19 they're particularly informative and the answers are equally
10:05:29 20 bad. List of affirmative defenses and lots of stomping of feet
21 saying, "No, we didn't" but not a fact.

22 All right. Is there anything the State needs
23 given the current state of the pleadings?

24 MR. OTTOWAY: Well, if you permit them to amend again,
10:06:01 25 the opportunity to file a dispositive motion. And then, we

1 would ask with respect to the date of the compounding for the
2 executions that have used, we'd ask that be stayed until we're
3 allowed to file a motion to dismiss or summary judgment.

10:06:23 4 THE COURT: It's a little late for a motion to
5 dismiss, isn't it?

6 MR. OTTOWAY: Your Honor, I'm going to cite 12(b)(6),
7 but I don't believe it is because their complaint was not
8 complete until you permitted them to file the alternative
9 theory.

10:06:39 10 THE COURT: Well, why didn't the State mention that a
11 long time ago? I'm not unraveling this. We have a real
12 problem; and despite the nature of this kind of litigation, it
13 is important to the Court, to the rule of law, to the public
14 perception of the State of Texas and this process, and the
10:07:18 15 claimants that we address the real issues and know what's going
16 on.

17 Everybody in the room understands that there's
18 some humanity and a lot of politics. As somebody who in his
19 youth tried political cases and as a judge who knows there's an
10:07:55 20 important way to accomplish things -- a lot of them are just
21 press releases with no substance, like somebody who lost an
22 election saying that his 1st Amendment rights were violated
23 because he wasn't elected. As somebody who's lost elections, I
24 may have felt that way; but I wasn't stupid enough to put it in
10:08:14 25 print.

1 All right. Before I get to the rest of mine,
2 Ms. Stratton, when would it be reasonable for Whitaker and
3 Williams definitively to amend the petition, remembering that
4 the rule says a short plain statement of the facts, not
10:08:51 5 additional briefing? Briefing can be done by them, but I need
6 to have in one document a succinct statement of the claims and
7 the facts upon which they rest.

8 MS. STRATTON: We can have it on file next week, your
9 Honor.

10:09:04 10 THE COURT: When?

11 MS. STRATTON: Next week.

12 THE COURT: Next week.

13 Now, Ms. Levin, are you going to write it?

14 MS. LEVIN: I don't know, your Honor.

10:09:17 15 THE COURT: Well, who is --

16 MS. LEVIN: One of --

17 MS. STRATTON: It's a team effort. This entire case
18 is a team effort, your Honor.

19 THE COURT: Well, it --

10:09:26 20 MS. STRATTON: There's not going to be one person who
21 takes pinch paper.

22 THE COURT: Well, it needs to be a lot better than
23 what I've seen, which sounds like the certificate of service has
24 been by Ms. Levin which should suggest some responsibility for
10:09:51 25 the missive to which her certificate is attached.

1 I don't think she's working as a third-level
2 associate just sending the things out. It needs to be clear.
3 Cutting and pasting is a fine thing as long as it makes sense
4 and as long as we don't switch Defendant and Petitioner and all
10:10:17 5 kinds of things. I've read it all.
6 How many of these kinds of cases have you joined?
7 MS. LEVIN: I'm sorry, which kinds of cases?
8 THE COURT: Death penalty kinds of cases.
9 MS. LEVIN: Scores. I couldn't give you a specific
10:10:42 10 number. I've been litigating death penalty cases for over 20
11 years.
12 THE COURT: Why isn't your paperwork better?
13 MS. LEVIN: I don't have an answer for that, your
14 Honor. I do my best.
10:11:01 15 THE COURT: How many of the people whom you have
16 represented have you ever met?
17 MS. LEVIN: Every single one of them.
18 THE COURT: When did you meet Whitaker and Williams?
19 MS. LEVIN: We're meeting them next week.
10:11:15 20 THE COURT: "Have met" and "gonna meet them" is
21 categorically different. That's the problem. You think "I'm
22 gonna to do something" you get credit for having done it. How
23 long has this case been on file?
24 MS. LEVIN: Your Honor, we've been in touch with the
10:11:30 25 named Plaintiffs in this case through their appointed counsel

1 when they had counsel. It is not --

2 THE COURT: My understanding is that's not exactly
3 what's been going on. Who was the -- ma'am, this case was filed
4 October 1, 2013; and next week you're going to meet your
10:12:13 5 clients. Who was the lawyer with whom you were coordinating?

6 MS. LEVIN: With Mr. Whitaker's case, he is
7 represented by James Rytting, and I have been in touch with him
8 since we filed this lawsuit and discussed it with him and
9 obtained his permission which he obtained from his client.

10:12:36 10 THE COURT: Have you seen something where Mr. Whitaker
11 signed permission?

12 MS. LEVIN: I believe I have e-mail --

13 THE COURT: I don't want a belief, ma'am. "Yes" or
14 "no"?

10:12:47 15 MS. LEVIN: I can't answer 100 percent. I had e-mail
16 correspondence with Mr. Rytting at the beginning of this
17 lawsuit.

18 THE COURT: Ma'am, I don't want a stream of conscious
19 narrative. Did you read the transcript from my harangue of poor
10:13:09 20 Ms. Stratton a couple of weeks ago?

21 MS. LEVIN: Yes, your Honor.

22 THE COURT: My guess is that was all properly
23 addressed to you, as I hope I carefully explained to her. This
24 is not a game. You're consuming resources, and your client
10:13:33 25 deserves better than being somebody third hand. Did you

1 represent the people in that Atlanta case that -- where I got
2 all the data from that Atlanta case for Mr. Yowell?

3 MS. LEVIN: I don't know what case you're referring
4 to.

10:13:56 5 THE COURT: Mr. Yowell's pleadings and expert things
6 were all taken from an Atlanta case, as I recall.

7 MS. LEVIN: I don't know. I've never represented
8 anybody in Georgia.

9 THE COURT: Where did you get the expert -- why did
10:14:15 10 you get all that stuff then if that wasn't your expert?

11 MS. LEVIN: Because we had an incredibly short time
12 frame to provide the Court with what you requested; and we did
13 the best we could, which was to borrow from other lawyers
14 litigating similar cases.

10:14:38 15 THE COURT: You've been doing this for 20 years all
16 over the country, you say, except Georgia.

17 MS. LEVIN: No. I've been --

18 THE COURT: I don't blame you for that.

19 MS. LEVIN: I've been doing it for 20 years in Texas,
10:14:50 20 your Honor.

21 THE COURT: Only in Texas?

22 MS. LEVIN: Some in Virginia, a trial case in
23 Colorado. Almost -- about 95 percent in Texas.

24 THE COURT: Okay. If you do it in Texas, Colorado,
10:15:05 25 and Virginia, that pretty much covers the country. Nobody wants

1 to have anything to do with the Atlantic Northeast or West
2 Coast. They snub us; we ought to snub them back.

3 MS. LEVIN: Your Honor, may I be heard on one thing?

4 THE COURT: Yes, ma'am.

10:15:37 5 MS. LEVIN: When I represent clients in habeas corpus
6 proceedings, I meet them, I take my job incredibly seriously and
7 my commitment to clients incredibly seriously.

8 THE COURT: Okay.

9 MS. LEVIN: In actions like this where the Plaintiffs
10:15:56 10 were already represented in their habeas proceedings at the time
11 we filed the lawsuit, the appropriate thing to me was to go
12 through their existing lawyers; and that is the reason we have
13 not met them to date. I have been keeping their counsel
14 apprised up until the time Mr. Williams had no lawyer.

10:16:22 15 THE COURT: Is that what Mr. Williams said in the
16 hearing last week or earlier this week?

17 MS. LEVIN: He was talking about his habeas corpus
18 lawyer.

19 THE COURT: Who is the person you're relying on.

10:16:39 20 MS. LEVIN: He is the person that I communicated with
21 when we initiated this lawsuit.

22 THE COURT: And what did Mr. Williams say about his
23 habeas corpus lawyer?

24 MS. LEVIN: He has not had a lawyer. His lawyer's
10:16:53 25 name was Mr. Williams, as well, so it's confusing; but he has

1 not had a lawyer --

2 THE COURT: Or simplifies it.

3 MS. LEVIN: -- since February of this year.

4 THE COURT: So, in the last seven months, with whom
10:17:06 5 have you been talking?

6 MS. LEVIN: I have not communicated with Mr. Perry
7 Williams during that time. I -- let me take that back. I wrote
8 Mr. Williams approximately two to three weeks ago to advise him
9 of the trial date and to let him know that we would be coming to
10:17:28 10 see him to discuss further.

11 THE COURT: So, you've been staying in touch, except
12 for the last eight months, through a lawyer who I don't know
13 what happened to him but has not been representing him. You
14 can't remember whether you have a power of attorney from him.
10:18:02 15 These men are not pawns for you to play with.

16 MS. LEVIN: That is the farthest thing and the
17 farthest manner in which I think of them.

18 THE COURT: Ma'am, your emotions do not matter. What
19 matters are the facts and the law. It's not about you, it's not
10:18:26 20 about your cause. You can have all the causes you want. But
21 when you file a suit, it has to be done right on time.

22 Mr. Williams and Mr. Whitaker deserve a fair
23 hearing, but they can't get one if it's going to be from stuff
24 you copied from an Atlanta case, or a Georgia case, and just
10:18:58 25 threw in there that raised an issue that appears to have no

1 substance, even according to Dr. Ruble, that is, they used a
2 compounding pharmacy.

3 The question is the quality of the drug. Do it
4 and do it on time and do it right. Is that clear?

10:19:27 5 MS. LEVIN: Yes.

6 THE COURT: Mr. Whitaker and Mr. Williams have been
7 well represented by local counsel.

8 And I assume you're doing it pro bono?

9 Not you.

10:19:43 10 MS. STRATTON: Me? Oh, yes, we're all doing it pro
11 bono, your Honor, including Ms. Levin.

12 THE COURT: How do you live if you do pro bono cases
13 full time?

14 MS. LEVIN: I don't do pro bono cases full time.

10:20:02 15 THE COURT: What do you do when you're not doing pro
16 bono cases?

17 MS. LEVIN: I have a variety of contract work by which
18 I get paid to do death penalty cases.

19 THE COURT: Say that -- you do contract work?

10:20:18 20 MS. LEVIN: Yes, your Honor.

21 THE COURT: On death penalty cases where you get paid?

22 MS. LEVIN: Yes, your Honor. Sometimes I do CJA
23 cases.

24 THE COURT: In Texas or --

10:20:34 25 MS. LEVIN: Yes.

1 THE COURT: All right. I would like briefly to
2 discuss Dr. Ruble.

3 MS. STRATTON: Yes, sir.

4 THE COURT: Pardon?

10:21:08 5 MS. STRATTON: I said yes, sir.

6 THE COURT: I, as I recall, put two questions to him:
7 The pharmacological deterioration data and that sort of thing,
8 the science on that in the abstract, and the direct medical
9 consequences with their timing and all that sort of thing.

10:21:38 10 I got a rather curious scientific report which at
11 least three and maybe four times quibbled or squabbled about the
12 Court's rulings saying he didn't have the data on -- and then,
13 he listed all the stuff about the specific facts in this case.

14 There is a body of scientific learning in
10:22:09 15 pharmacology, physiology, physical medicine that I want the
16 Petitioners to display. He didn't do that. First, somewhere in
17 there, he says he's not a doctor so he can't talk about that;
18 and the last page is nothing but a medical analysis, a bad
19 medical analysis. So, he starts out saying he can't do it and
10:22:39 20 ends up doing it anyway.

21 When I tell him to do something, I am not
22 interested in what he thinks I should tell him to do. You-all
23 are free to ask him any question you want and get him to write
24 about it. What I wanted then and I still want now is the
10:23:02 25 pharmacology on pentobarbital liquified for injection.

1 There has to be more. He also must have been an
2 appellate lawyer once like Mr. --

3 MS. STRATTON: He is a lawyer, your Honor.

4 THE COURT: Oh, he is that, too?

10:23:33 5 MS. STRATTON: He has a JD.

6 THE COURT: Well, that explains it.

7 MS. STRATTON: He was a patent attorney.

8 THE COURT: Oh.

9 MS. STRATTON: So, we take them as we get them, but
10:23:39 10 that's --

11 THE COURT: He's a recovering patent attorney.

12 MS. STRATTON: Yes.

13 THE COURT: All right. Because the quality of his
14 report is not determined by the number of sections he can quote,
10:23:58 15 and it started with him -- none of which answers the question.
16 And then, for the doctor, I need to know the physical
17 consequences to a human body when it has been injected with
18 pentobarbital liquified that meets any of the descriptions of
19 what happens to it as it's kept.

10:24:29 20 For instance, the granulation -- I don't think
21 that's the right term. The things Ruble says cause pulmonary
22 hematoma and pulmonary embolisms or something?

23 MS. STRATTON: Yes.

24 THE COURT: Not in 30 minutes would be my medical
10:24:55 25 guess; and since he's guessing, I'm going to guess, too. I need

1 the data that it will have particles of this size or that size
2 and then a doctor to say if they're Size A, these are the
3 consequences within two or three hours. If they're this size,
4 these are the consequences. If they're this size, those are the
10:25:27 5 consequences. And here is, again, the medical consequence of
6 the primary consequence. And we'll just use pulmonary
7 embolisms.

8 I can speak it but I can't spell it. That if the
9 granule gets to his lungs of whatever size and not all of them
10:26:00 10 will have an immediate adverse effect. So, the likelihood of
11 there being a lesion or a blockage in the lungs within a couple
12 of hours or -- that may be too long.

13 But we're talking 45 minutes maximum, aren't we?

14 MR. OTTOWAY: I believe the longest has been 30.

10:26:26 15 THE COURT: I think it's something like that. But I'd
16 like to go beyond that so that we know the margin of safety or
17 whatever you call it under these circumstances, efficacy. I
18 need a physician to do that; and I need a non-argumentative,
19 non-petulant person to answer my question. That's all --

10:26:58 20 MS. STRATTON: I will tell you, your Honor, Dr. Ruble
21 and I had many conversations about how to answer the Court's
22 questions as you phrased them in the case management order. His
23 struggle was twofold: one, which was what I was concerned that
24 it would be when we were last before you, is that the testing --
10:27:25 25 there isn't industry testing done on compounded pentobarbital

1 that will answer your question. And so, he's doing a lot of
2 surmising based on testing that's done on manufactured
3 pentobarbital as well as his understanding of the compounding
4 process.

10:27:44 5 THE COURT: I'm sorry. But it's part of this job. I
6 can interrupt.

7 MS. STRATTON: No, that's okay.

8 THE COURT: Does manufactured pentobarbital, when
9 liquified, have the same mechanical and chemical properties?

10:28:04 10 MS. STRATTON: Dr. Ruble's opinion is it is not the
11 same drug.

12 THE COURT: I don't -- I'm not -- he pretty much
13 self-eroded his credibility. I need somebody who will again
14 quit raising that. If he can't find standards on it, then say,
10:28:30 15 "You need to find somebody who can find the standards." But I
16 don't know and he doesn't know -- or certainly, he didn't tell
17 me what a difference was that was material to this inquiry
18 between those two kinds of pentobarbital and how it would affect
19 Mr. Whitaker and Mr. Williams. He keeps going back to he
10:28:59 20 doesn't want me to allow him to do it.

21 Are the --

22 MS. STRATTON: I think the issue is probably me, your
23 Honor, in translating what you're asking to his question. I
24 know that we spent a lot of time trying to make sure that what
10:29:24 25 he was including in his report was answering your question. And

1 so, I'm sure that if it is not, then it is -- it is on me that
2 I'm not translating it correctly because --

3 THE COURT: I'm confident it's not you.

4 MS. STRATTON: -- Dr. Ruble is -- no, no, no. I'm
10:29:41 5 confident it is me, your Honor; and the reason that I say that
6 is because Dr. Ruble is an insanely smart man.

7 He's also an insanely humble man, and he will --
8 he would be very embarrassed by the fact that I was standing
9 here saying that about him, but he -- he will most certainly
10:29:59 10 answer any question that you have and -- but his struggle with
11 the question you had in the case management order is that it's
12 -- it's not -- it's not directly answerable scientifically.

13 And it's not that he can't answer it, it's that
14 he doesn't believe it is answerable and in part is because of
10:30:22 15 the degradation isn't linear.

16 THE COURT: It normally isn't. It certainly wasn't in
17 my case. I seem to be picking up the pace of degradation
18 geometrically.

19 MS. STRATTON: But your question was fairly linear;
10:30:40 20 and so, he was -- he was challenged at how to answer your
21 question directly because --

22 THE COURT: Well, there's going to be a line; but
23 where the curve on the line is, it can go like this and then --
24 I guess degradation goes the other way. Yes, there's going to
10:30:56 25 be two axes on which you can plot the data.

1 MS. STRATTON: I believe that is what he tried to do;
2 but if he -- but if he didn't, then it's more on me than it is
3 on him. I truly believe that if he was sitting there in the box
4 and you were answering (sic) him questions, he would be able to
10:31:12 5 answer your questions.

6 THE COURT: But the way it works is --

7 MS. STRATTON: I understand.

8 THE COURT: -- we make him articulate it and support
9 it in writing so that everybody can look at it beforehand.

10:31:28 10 MS. STRATTON: Understood.

11 THE COURT: Because technical reports need study.
12 It's not exactly reading the officer's report of an accident.

13 MS. STRATTON: I agree. Understood.

14 THE COURT: And I tend to like physics and chemistry
10:31:49 15 better than economics, although I know a lot more about
16 economics. They just write differently. I am content that you
17 should ask him, if you choose, to write the question he thinks I
18 should ask. What is the scientific question in the abstract?
19 Not how fast did the delivery boy go with any particular load;
10:32:40 20 but given the range of things that can happen, what is the data
21 on that?

22 And if he can only do it for manufactured, then
23 -- and since he both says he is a physician and isn't in the
24 report, does he want to draft -- if he would like, he may draft
10:33:07 25 the medical question.

1 MS. STRATTON: So, on the medical issue, Dr. Ruble has
2 some clinical experience in injectables.

3 THE COURT: So do I.

4 MS. STRATTON: Not from the receiving standpoint, from
10:33:31 5 -- I'm trying to find a way to be funny, but I'm not a funny
6 person. So, he -- and so, that's why he felt he could answer
7 the second question in a limited fashion. We have, however --

8 THE COURT: After saying he couldn't and he didn't
9 answer it.

10:33:46 10 MS. STRATTON: You're correct, he didn't. He said,
11 "This is what I think is a possibility." But he had no clinical
12 experience to back it up.

13 THE COURT: And guessing with the standard of
14 possibility is not acceptable and it was a press release about
10:33:58 15 how horrible it could be.

16 MS. STRATTON: I don't disagree. But at the last --
17 the 26th, whatever date that was -- days are bleeding together
18 in my mind these days -- we had started a very -- when we saw
19 your question come out in the case management order, we knew
10:34:16 20 Dr. Ruble could not answer that question.

21 It's not his experience. He's not a medical
22 doctor. And so, we began the process to find someone who could
23 answer that question, and we have. Had we still been set for
24 trial next week, we would have filed a report yesterday from
10:34:33 25 that doctor. Her name is Nancy Glass. She's from Houston. She

1 is an anesthesiologist. She works at Baylor and Texas
2 Children's Hospital. She had -- can answer that question.

3 THE COURT: An anesthesiologist?

4 MS. STRATTON: An anesthesiologist, yes. And she can
10:34:50 5 answer that question.

6 THE COURT: I don't care if they're from Canada or --

7 MS. STRATTON: Well, we wanted someone local. I mean,
8 partly, we're doing this pro bono, so my firm is paying them.
9 And so, you know, that's what you do when you take a pro bono
10:35:05 10 case; and so, if I can find someone from Texas that's from
11 Houston, then, you know, that's what I wanted to do.

12 And so, we found someone local. She had started
13 a report. I gave her a reprieve --

14 THE COURT: Good.

10:35:17 15 MS. STRATTON: -- since you gave us a reprieve. But
16 she will finish that report, and she will be able to thoroughly
17 answer your question number two.

18 THE COURT: All right. Does she need the first
19 question data? Because my thought was you get the chemical
10:35:37 20 processes described accurately and then the physician responds
21 to that because this may not be something that's common enough.
22 It may be that there are enough other drugs that have the same
23 problems that she may know.

24 MS. STRATTON: Correct. And she does.

10:35:54 25 THE COURT: So, at the moment, we may have enough

1 time. So, ask her if she would like to wait until I get an
2 acceptable answer to the first question.

3 MS. STRATTON: I'm sure as a lawyer I would like her
4 to be able to wait until the answer to the first question.

10:36:14 5 THE COURT: Yes.

6 MS. STRATTON: I mean -- but she does have enough
7 experience with injectables, obviously, as an anesthesiologist
8 that -- and she's not a newly licensed physician either. She's
9 been licensed for more than 20 years and has a lot of experience
10:36:33 10 and has experience in, what's the word, the de-liquifying of the
11 injectable.

12 I know they have a medical term for that, and my
13 brain is escaping me as to what it's called. But when it's --
14 the chunks start to show up in the vial. You know, she has
10:36:52 15 experience with that.

16 THE COURT: It curdles. When it curdles.

17 MR. OTTOWAY: Precipitates.

18 MS. STRATTON: Precipitates, thank you. The legal
19 term -- or the medical term.

10:37:05 20 THE COURT: It may not be precipitation. It may be a
21 chemical reaction between --

22 MS. STRATTON: But for the precipitation into water --

23 THE COURT: Yes.

24 MS. STRATTON: -- it, you know -- I mean --

10:37:09 25 THE COURT: But it may be a reaction between two

1 components after certain forms of some third kinds of stuff.

2 MS. STRATTON: Right. Basically, where the powder is
3 no longer liquified. When that begins to happen, she has
4 experience with that; and regardless of Dr. Ruble's --

10:37:25 5 THE COURT: Has to be a common problem.

6 MS. STRATTON: What's that?

7 THE COURT: It has to be a common problem that things
8 don't stay the way they were and they either deteriorate or
9 react. All --

10:37:36 10 MS. STRATTON: I don't know if she would call it
11 common, but she would definitely call it a problem. I don't --
12 it's something she's experienced. I don't know how common it
13 is. I didn't ask her.

14 THE COURT: I don't know that it wouldn't happen with
10:37:49 15 Tetanus if you left it laying around.

16 MS. STRATTON: It probably would, I would imagine.

17 And so, she has read both of Dr. Ruble's previous
18 reports. She informed me that she found them helpful and
19 informative and in line with her opinion about, you know, the
10:38:05 20 injectables; and -- but if -- I would prefer, because she's in
21 part basing some of her opinion off of Dr. Ruble's opinion, that
22 she be able to --

23 THE COURT: But you need to tell her --

24 MS. STRATTON: If he's going to revise a report, then
10:38:20 25 she'd like -- I'd like for her to be able to provide her report

1 after that.

2 THE COURT: First, I want a question because at the
3 moment I don't want another report from him.

4 MS. STRATTON: Okay.

10:38:29 5 THE COURT: But since you asked --

6 MS. STRATTON: Oh, you want a question.

7 THE COURT: I want --

8 MS. STRATTON: You want to know what would be the --
9 in his world, what would the question be that you --

10:38:36 10 THE COURT: And after he writes it, before you send it
11 to me, you might run it by her to see if she thinks it's the
12 right question. But I don't want her to sit here and testify
13 that, Well, based on Ruble, I opine this. I have no confidence
14 in him.

10:38:58 15 MS. STRATTON: Well, I hope to rehabilitate you for
16 him, your Honor, because --

17 THE COURT: No, him for me, not me for him. I'm
18 unrehabilitative (phonetic spelling).

19 MS. STRATTON: I got my pronouns backwards. I hope to
10:39:09 20 rehabilitate him for you because he is -- he is an amazing
21 educator, I'll just put it that way. I've become very educated
22 about compounded drugs because of what he shared and what he has
23 provided, and I am confident that he will be able to very --

24 THE COURT: That's why I'm giving you one more
10:39:34 25 chance --

1 MS. STRATTON: Okay.

2 THE COURT: -- to see if he can do it.

3 MS. STRATTON: Okay. I think the issue may be that
4 we're trying to do this -- I understand what the rule requires
10:39:42 5 on written paper, but Dr. Ruble's much more eloquent in a
6 conversation.

7 THE COURT: Perhaps. But you know, there's this law
8 and order compound.

9 MS. STRATTON: Yes.

10:40:04 10 THE COURT: The order turns out to be fairly
11 important.

12 MS. STRATTON: Agreed.

13 THE COURT: And you know, I can't have somebody
14 testify who is likely to volunteer information.

10:40:19 15 MS. STRATTON: I'm sorry, I don't understand.

16 THE COURT: Well, it happens with all kinds of
17 witnesses where they're asked one question but they answer it by
18 -- by saying --

19 MS. STRATTON: Oh, sure.

10:40:30 20 THE COURT: -- something about somebody in Kansas City
21 dying three times. You know, like the guy in Atlanta testifying
22 that compounded drugs are unusable because a bunch of old people
23 died in Massachusetts of meningitis.

24 MS. STRATTON: Dr. Ruble most certainly -- he's not an
10:40:52 25 experienced testifier. I mean, he's -- to my understanding,

1 he's only testified once previous. His life as an attorney was
2 fairly short-lived; and as we know, when you're dealing -- well,
3 as my experience with patent lawyers, you don't necessarily prep
4 witnesses very often.

10:41:08 5 So, he doesn't have a lot of experience in being
6 a witness or prepping a witness or helping to relay -- answer
7 the question asked while on the stand. That's most certainly --
8 you know, he's a layman where that's concerned, but he's an
9 incredibly smart pharmacist.

10:41:26 10 THE COURT: As I have said in print that lawyers are
11 among the smartest best lawyers I see, but they invented
12 over-litigation. There's just not a fact in existence about
13 whatever it is that I don't need to know and life is a little
14 more practical than that.

10:41:49 15 All right. Let's take a 15-minute recess.

16 (Court recessed at 10:43 a.m.)

17 (Court resumed at 11:07 a.m.)

18 THE COURT: She's looking for her Valium.

19 MS. STRATTON: I was looking for a highlighter
11:08:23 20 actually.

21 THE COURT: Here.

22 MS. STRATTON: Oh, thank you.

23 THE COURT: I think what Ruble is trying to say is if
24 you build a house out of oak and you build one out of pine, they
11:08:59 25 both meet the building codes. One of them is not as strong as

1 the other; and it may have consequences, early rot in the pine,
2 maybe less tensile strength. Don't write this data about oak
3 and pine.

4 MS. STRATTON: I have to write notes so that I
11:09:28 5 remember references --

6 THE COURT: Okay.

7 MS. STRATTON: -- because I have a horrible memory.

8 THE COURT: I'm guessing about tensile strength and
9 things like that. And he's saying that, if you have this
11:09:44 10 compounded stuff, it's like the pine house and is liable to
11 deteriorate faster. That's not a -- that's a good analogy but
12 it's not perfect, obviously.

13 I need to know that there would be four or five
14 standards by which you could judge whether in this case the
11:10:20 15 house only has to last six months so it probably would be
16 irrelevant but if you were planning on something that needed to
17 be there 40 years later, it might make a difference.

18 And please, he should not use that analogy
19 because it may not be even close enough. But he has to tell me
11:10:49 20 how he knows compounded is pine and manufactured is oak. But
21 mainly, I need to know from either or both of them what the
22 specifics are that would make somebody decide to choose one over
23 the other.

24 How many autopsies were done on the 26 prisoners
11:11:21 25 who were executed?

1 MR. OTTOWAY: I apologize, your Honor. I could find
2 that out for you, but it is my understanding that there are no
3 autopsies done on those individuals. But again, I could follow
4 up.

11:11:32

5 THE COURT: All right. Double-check.

6 If there are autopsies, do you want them?

7 MS. STRATTON: If there are, yes, of course, I would
8 want them.

9 THE COURT: Why didn't you ask for them?

11:11:42

10 MS. STRATTON: Because Ms. Levin does not believe that
11 they are done.

12 THE COURT: I know. But belief is not nearly as good
13 as actual data.

14 MS. STRATTON: She may actually know. She wants to
15 say something.

11:11:52

16 MS. LEVIN: I've seen it in a legal document that TDCJ
17 has stated that they do not perform autopsies.

18 THE COURT: Okay.

11:12:05

19 MR. OTTOWAY: I can say that the policy releases the
20 body to a funeral home as opposed to a coroner. And so, I don't
21 believe that's --

22 THE COURT: Just make sure. And get somebody to put
23 their left thumb print on it so we can make sure that what that
24 lawyer for the State said was true.

11:12:18

25 MR. OTTOWAY: I will send an e-mail to opposing

1 counsel when I find out.

2 THE COURT: Well, find out but get somebody who is an
3 operating person to write a simple declarative sentence and say,
4 "Of the 26 pentobarbital executions, none was autopsied" or
11:12:44 5 seven were. If seven were, get Ms. Stratton seven autopsies
6 along with the age of the pentobarbital on those occasions.

7 All right. There is no need to rush, but we need
8 to get this done and get it done in the next 60 days or so. If
9 the State of Texas thinks it might be fixing to set a date, you
11:13:38 10 should tell the Court and counsel.

11 MR. OTTOWAY: Yes, your Honor.

12 THE COURT: We don't need to know the date, we just
13 need to know that it's back in the pipeline or something. So, I
14 may want to adjust the schedule based on some sort of likely
11:13:56 15 imminence.

16 When -- oh, you're going to amend next week?

17 MS. STRATTON: Yes. If we could have until Friday.
18 We're currently planning to go see Mr. Whitaker and Mr. Williams
19 on Thursday. So, that will give us time.

11:14:40 20 THE COURT: All right. The 11th?

21 MS. STRATTON: Yes.

22 THE COURT: Now, you have only four days next week.

23 MS. STRATTON: Understood. We were very close to
24 having it done yesterday, so we don't need a lot more time.

11:14:52 25 THE COURT: Well, go back and edit it.

1 MS. STRATTON: We will, your Honor, I promise,
2 particularly the style of the case.

3 MR. OTTOWAY: Your Honor --

4 THE COURT: Yes, sir.

11:15:13 5 MR. OTTOWAY: -- do you have a deadline that you would
6 like to impose on the State with respect to a motion to respond
7 to their amended petition?

8 THE COURT: No. I want to suggest a deadline on the
9 autopsy data, the age of the pentobarbital data and when you get
11:15:35 10 me the master --

11 Formulation record?

12 MS. STRATTON: That's what it's called, yes.

13 THE COURT: -- and the certificate of analysis, too --
14 I wrote the words without --

11:15:51 15 MS. STRATTON: That's correct, also.

16 THE COURT: Get those to me.

17 MR. OTTOWAY: To you for in camera review?

18 THE COURT: Yes. I'll look at them, and I may
19 reluctantly appoint a Court-appointed technician under whatever
11:16:10 20 that rule is. I've only done it once in 36 years, whatever it's
21 been. But it should be a narrow inquiry so that I just better
22 understand this.

23 MR. OTTOWAY: And so -- I'm sorry. If I could make
24 sure I have everything that you're looking for.

11:16:35 25 THE COURT: You're going to get an order.

1 MR. OTTOWAY: Okay.

2 MS. STRATTON: And then, just -- I mean, just to be
3 clear, your Honor, I mean, upon reviewing those, if -- I just
4 want to make sure that it's understood that if the pharmacy is
11:16:51 5 really legitimately concerned about, you know, trade secrets and
6 proprietary information, everyone on our side of the case,
7 including our experts, is willing to enter into a protective
8 order. We're not opposed to that; and frankly, I think I've
9 suggested it to them, so --

11:17:08 10 THE COURT: I know no way -- and this is not a
11 reflection on you-all, but I know no way to enforce that.

12 MR. OTTOWAY: And I have to say, your Honor, that is
13 the concern of the State with respect to providing that
14 information at this time.

11:17:22 15 THE COURT: I understand that. That's why I'm going
16 to the trouble of looking.

17 MS. STRATTON: I just want to be clear.

18 THE COURT: If it were not this type of case, I would
19 let Ms. Stratton see anything on her word that she wouldn't use
11:17:36 20 it otherwise.

21 And I'm not suggesting you would in this case.

22 MS. STRATTON: No. Understood. I understood the
23 point and I --

24 THE COURT: There are too many people with too much
11:17:48 25 access to documents that I order people to produce.

1 MS. STRATTON: Understood. And I was also saying that
2 with the caveat assuming that anything pertaining to the
3 pharmacy or the chain of purchase would even be redacted, you
4 know.

11:18:09 5 THE COURT: You can give me the unredacted version so
6 I can make sure you only redacted the data that should be
7 redacted. So, give me both. But I'm interested in the
8 scientific data.

9 MR. OTTOWAY: Well, your Honor, I have to make some
11:18:29 10 objections to that.

11 THE COURT: Okay.

12 MR. OTTOWAY: And so --

13 THE COURT: You want me to overrule them now or after
14 you make them?

11:18:34 15 MR. OTTOWAY: I'd like to make them.

16 THE COURT: Okay.

17 MR. OTTOWAY: I believe that they should file their
18 amended petition -- or I'm sorry, their complaint and we should
19 be allowed to file a 12(b)(6) motion.

11:18:44 20 THE COURT: I know you do, and I've already ruled on
21 that. How many times do you want me to rule on that?

22 MR. OTTOWAY: I need to preserve the record, your
23 Honor.

24 THE COURT: Every time you raise it doesn't create a
11:18:53 25 new record need.

1 MR. OTTOWAY: With respect to the discovery, your
2 Honor, and I apologize.

3 THE COURT: It applies to everything in the case,
4 counsel.

11:18:59 5 MR. OTTOWAY: Okay. Thank you, your Honor.

6 THE COURT: You objected once. You stated the
7 problem, and I overruled it.

8 MR. OTTOWAY: All right.

9 THE COURT: And that overruling is good for the entire
11:19:09 10 hearing today.

11 MR. OTTOWAY: Thank you, your Honor.

12 THE COURT: And if you would like it to be more
13 official, I'll do it in Mr. Clendenin's blood. He should
14 contribute to this.

11:19:37 15 All right. As we now stand, Ms. Stratton,
16 Williams and Whitaker do not have a pharmacological technician.
17 It will have to be new from the -- I think I have two reports?

18 MS. STRATTON: You have two reports from Dr. Ruble.

19 THE COURT: They don't pass the test for reliable
11:20:11 20 scientific testimony because they argue about data that are not
21 relevant. The only question he agreed with the pharmacologist
22 that the State had about post-liquefaction testing, it
23 eliminates concerns about pre-liquefaction quality.

24 MS. STRATTON: I don't know what to do with that, your
11:20:59 25 Honor. I mean, you have asked some very specific questions of

1 us to answer, and we've tried to answer those very specific
2 questions. I guess I'm at a loss to understand what it is I can
3 do differently in order to overcome this burden you're putting
4 on us.

11:21:23 5 THE COURT: I'm not, the law does. I'm not having
6 Ruble testify from a report which is 60 percent extraneous and
7 inconclusive and unsupported for the rest. I've read both
8 reports at least twice. I need the data that I asked for and
9 expertly. So, we're going to start question and we're going to
11:22:00 10 let him answer my question by giving me the question to see if
11 he's got the question right. And then, you'll -- when we get
12 the answer to that, if that meets the test, we'll let the doctor
13 rely on it to form her opinion.

14 MS. STRATTON: Okay. I -- okay. I'm standing here
11:22:21 15 perplexed because I hear what you're saying. I'm concerned
16 though, with all due respect, that the issue is that it's not --
17 it's not black and white because of the nature of compounding
18 drugs. And I -- I don't want the issue to be me because I'm not
19 relaying it correctly.

11:22:52 20 THE COURT: No. But there is a line in one of the
21 reports where he says post-compounding testing verifies the
22 correctness of everything that went before. If they're putting
23 used tires in there, it will show up after it's liquified.

24 MS. STRATTON: Yes, he does say that.

11:23:14 25 THE COURT: You know, if this were an ordinary case,

11:23:41 1 having given him one opportunity to clarify his report and
2 address the issues in the case and his having failed -- not
3 failed; that's the wrong word -- declined to do it, in an
4 ordinary case, they don't get to get a new expert or
5 re-rehabilitate this one.

6 But because of the nature of this problem, I'm
7 going to let Whitaker and Williams have more latitude; but it's
8 -- whatever their personal limitations, they do not affect the
9 availability of scientific data in their defense, not criminal
11:24:05 10 defense, in their defense of this drug being used on them.

11 MS. STRATTON: Okay. Dr. Ruble has told me -- and I
12 am not recalling whether or not it's in his second report or not
13 -- that subsequent testing would be helpful; and I do know from
14 talking to Mr. Ottoway that subsequent testing is going to be
11:24:37 15 done. I think the results of that test, irregardless of the
16 question you want Dr. Ruble to pose, would, in fact, provide him
17 with the data that he believes is missing.

18 THE COURT: Why wouldn't testing on the morning of the
19 execution moot the argument? If it's good at 10:00 o'clock in
11:25:05 20 the morning, at 6:00 that evening it's probably still going to
21 be good.

22 MS. STRATTON: I would say that's probably fair. I
23 don't think that Dr. Ruble would disagree with that statement.

24 THE COURT: So -- I mean, that's why all -- and there
11:25:21 25 might be pentobarbital that's brought from a vaulted cistern in

1 Switzerland and some of it is going to go bad. So, its pedigree
2 is not a guarantee of anything.

3 MS. STRATTON: Agreed.

4 THE COURT: It is a guarantee within probably 2,000th
11:25:53 5 of a percent; and so, once we get the immediate answer, that
6 seems to moot the complaint. I think the State ought to do
7 that. I refrained from insisting on it last time hoping that it
8 had the wisdom to figure out how to do it.

9 All you have to do is from now on order twice as
11:26:13 10 much. Isn't that sufficient?

11 MR. OTTOWAY: I don't know, your Honor. I don't know.

12 THE COURT: I mean, if it takes one unit for the
13 injection, you get -- you buy three units. You test one -- test
14 it when you get it, test it right before the execution; and if
11:26:39 15 it's still good, do the execution. It seems to me you're just
16 having to increase the purchase volume by 50 percent.

17 That's not a ruling. I just think -- did the
18 State suspect I was going to do something outrageous where they
19 have an appellate lawyer doing the initial work? They've had
11:27:06 20 some experience with outrageous things, mainly in response to
21 what it had done.

22 MS. STRATTON: I think, your Honor, that you're
23 actually honing in on what Dr. Ruble was attempting, even if he
24 didn't say this in his report, is that the nature of compounding
11:27:22 25 versus manufacturing of a drug is such that every batch of drugs

1 is different.

2 And what you said, testing the day of or testing
3 within a short period, you know, whatever that appropriate short
4 period is based on how it was stored, is -- would be
11:27:43 5 appropriate. Now, whether that's cost feasible, I don't know.
6 I'm sure that they're going to tell you it's not.

7 THE COURT: Is it the case that Whitaker and Williams
8 will stipulate that if the State tests it and the test meets
9 whatever the medical standard is on the day of the execution,
11:28:01 10 the case is moot?

11 MS. STRATTON: Possibly. I don't think that's
12 something I can stipulate to the Court without talking to my
13 clients but --

14 THE COURT: Not right now. But that would be --

11:28:18 15 MS. STRATTON: In concept, yes, your Honor.

16 THE COURT: Do you speak French?

17 MS. STRATTON: "Un peu."

18 THE COURT: Do you know how to say "no" in French?

19 MS. STRATTON: "Oui." "No."

11:28:45 20 THE COURT: "En principe, oui."

21 MS. STRATTON: I can't remember what all --

22 THE COURT: In principle --

23 MS. STRATTON: Oh.

24 THE COURT: -- yes.

11:28:53 25 MS. STRATTON: In principle, yes.

1 THE COURT: No. Which is the reverse -- if you say,
2 "I'm with you in principle," that means "Don't count on me."
3 So, in principle, that seems to be clear.

4 MS. STRATTON: Correct.

11:29:45 5 THE COURT: As I understand it, there's more to the
6 testing protocol than what has been disclosed?

7 MR. OTTOWAY: I'm sorry, I'm not sure what it is
8 you're referring to.

9 THE COURT: I don't want you to do the testing or
11:30:25 10 review the testing if it's not a scientific rigorous --
11 scientifically rigorous test. And so, I guess you've disclosed
12 the results but not the protocol?

13 MR. OTTOWAY: Well, there was -- there was an
14 affidavit from a DPS chemist who had used these same type of --
11:30:52 15 same type of equipment that the independent laboratory had used,
16 and he was discussing the equipment used and then the nature of
17 the results.

18 THE COURT: All right.

19 Do Whitaker and Williams have any objection to
11:31:07 20 the testing itself?

21 MS. STRATTON: I don't know anything about the testing
22 whatsoever except they've told me they're going to do it. I
23 don't know what kind of testing --

24 THE COURT: No. I mean, the process that they've
11:31:18 25 already disclosed that they do do.

1 MS. STRATTON: The only thing that I'm aware that they
2 do is that it's sent to -- a portion of a batch is sent to Eagle
3 Labs for testing and the results is that sheet that we've all
4 seen. And somehow from the pharmacist, they're getting what
11:31:42 5 they're calling a use-by date or an expiration date that -- I
6 mean, they're calling it an expiration date.

7 I don't know anything other than that. That's
8 all I know. I mean, I have a million questions I'd like to ask;
9 but I mean, it would, to some extent, require cross-examining
11:32:01 10 the -- someone; and I know that my ability to do that is
11 limited.

12 THE COURT: What do you know -- see, I'm making them
13 produce stuff and then you say, "Well, we don't know. We need
14 to ask about it." You're supposed to have somebody who's told
11:32:16 15 you what's wrong with a test that gives the -- and as I recall,
16 the trooper's report said essentially what he did. But I have
17 no evidence of anything wrong with the laboratory's testing or
18 what would be the day of testing in the prison.

19 MS. STRATTON: Okay. I mean, fair enough. I have not
11:32:50 20 -- I mean, I have asked Dr. Ruble those questions, but I haven't
21 asked them the way that you're asking them right now. He does
22 have some opinions about the proper way to do the testing and
23 what would be appropriate.

24 THE COURT: I suspect he does. What I need is what is
11:33:13 25 sound pharmacological or chemist, whoever those people are,

1 practices and not standards you might use, say, on therapeutic
2 chemicals.

3 MS. STRATTON: Understood.

4 THE COURT: And so, if he has anything to say about
11:33:34 5 testing, it has to be very specific to these kinds of drugs,
6 this kind of application, this kind of waiting.

7 And did I get that right, Mr. Ottoway, that the
8 trooper said -- first, the State says they'll use what the
9 trooper said if there's day-of testing?

11:34:04 10 MR. OTTOWAY: I'm sorry, your Honor, would you mind
11 repeating that?

12 THE COURT: If the State of Texas tests the drugs
13 immediately before their use, it will use the process
14 articulated by the state trooper in his affidavit?

11:34:26 15 MR. OTTOWAY: If we were to test them on the day,
16 I'm --

17 THE COURT: That's a "yes" or "no" question, counsel.

18 MR. OTTOWAY: I cannot guarantee it, your Honor. I
19 don't know that the laboratory that's being used right now could
11:34:41 20 be used in the future.

21 THE COURT: I didn't say you have to use Room 12B7 in
22 Wing 4 of the Walls Unit. The process will be the same?

23 MR. OTTOWAY: Again, your Honor, because we don't know
24 when these individuals will be executed, I cannot say that the
11:35:06 25 same type of testing, if we were to do it on the day of, would

1 be identical to --

2 THE COURT: Well, find out. What are they discussing
3 on the day of execution?

4 MR. OTTOWAY: We had discussed --

11:35:20 5 THE COURT: No, I don't want what you talked to her
6 about. She tricked you into saying things. I want to know
7 what's really going on there at the prison. You don't know
8 anything about testing drugs.

9 MR. OTTOWAY: You're right, your Honor, I don't. The
11:35:34 10 additional tests that we had talked about, you had asked at the
11 prior hearing whether we were going to do additional testing.
12 It wasn't, I believe, specific about whether it was on the day
13 of the execution; and so, we agreed to do it in further
14 discussion with opposing counsel to do another test for a piece
11:35:53 15 of data. So, I apologize, not --

16 THE COURT: That will not satisfy Williams and
17 Whitaker, that if you're going to do another date so that
18 Stratton will leave you alone and you're going to keep them for
19 three more years and keep the data -- I mean, the drug for three
11:36:15 20 more years and then use it.

21 I don't know if it makes any difference. But the
22 simple thing to do -- and this is not a ruling -- is to get
23 three batches. Test one when it arrives, test the second one
24 the day of the execution, and use the third one, assuming it
11:36:33 25 passes. And that's a very simple way to solve the problem.

1 MR. OTTOWAY: I will take that to my client, your
2 Honor.

3 THE COURT: Like I said, I'm not ordering that; but
4 just another test that is not related to it because, if you wait
11:36:52 5 after the second test, we're back to the same problem. It's an
6 empty gesture.

7 MR. OTTOWAY: Again, your Honor, I will take that to
8 my client.

9 THE COURT: Has your anesthesiologist testified much?

11:37:23 10 MS. STRATTON: She's testified some. I mean, she's
11 not a -- I mean, she's a career clinician. She's not a career
12 expert, but she has testified some.

13 THE COURT: This is not a criticism. But it's just
14 weird to sit up there with an evil presence behind you, 14
11:37:43 15 stranger -- well, they won't be here but then a whole bunch of
16 cross and lawyers out there asking you weird questions. So,
17 acclimating her as a witness -- and even Ruble, if he gets to be
18 one. Bring them up, let them look at the room, let them walk
19 around, let them get a sense of the place before you throw them
11:38:07 20 in here. You're used to it.

21 MS. STRATTON: Understood, your Honor. I'm going to
22 be a witness in a couple of weeks, your Honor. I'm not looking
23 forward to it.

24 THE COURT: Because I want to use her or somebody
11:38:25 25 qualified, but it has to be structured like a medical report.

1 You don't have to write as low as you would for the FDA board in
2 crayon but for an assumed intelligent lady. We'll just presume
3 that.

4 And if she thinks she needs something that is not
11:39:01 5 reasonably available, if you -- she'll tell you, you can tell
6 him; and if you-all can't agree or it's not reasonably available
7 at all, we can get back together and figure out what to do with
8 it.

9 MS. STRATTON: Understood.

11:39:23 10 THE COURT: Anything else for the Petitioners?

11 MS. STRATTON: Your Honor, the only thing that I want
12 to make the Court -- and I've sort of made opposing counsel
13 aware of -- is I understand your -- if Dr. Ruble gets to
14 testify, where we are on that. He has a very difficult fall
11:39:42 15 schedule because of his teaching commitments at the University
16 of Utah.

17 He does not have much availability to be away
18 from Utah during the semester with the exception of a week in
19 October and three days in December. And I just want to make the
11:40:00 20 Court aware of that limitation. I just became aware of it
21 myself last night.

22 THE COURT: Ms. Levin, you're not counsel in the Perry
23 habeas corpus case; is that right?

24 MS. LEVIN: That's correct.

11:40:41 25 THE COURT: So, why are you filing pleadings?

1 MS. LEVIN: That's what the AG wanted to know. I
2 filed an advisory with the Court because there's this
3 connection --

4 THE COURT: It's not an advisory, it's a pleading.

11:40:57 5 MS. LEVIN: It's a pleading labeled an advisory.

6 THE COURT: I might as well, you know, let the
7 governor of Oklahoma file an advisory in this case because he
8 doesn't think Ottoway is going to do it right.

9 MS. LEVIN: The connection between the two cases, the
11:41:11 10 fact that --

11 THE COURT: No. They're distinct cases. It's
12 absolutely -- I'm not going to help Judge Gilmore. She's not
13 going to help me. Now, in truth, we'll help each other; but
14 we're going to work that out. They are distinct cases.

11:41:38 15 The information that is in this should have been
16 submitted by a lawyer in that case. We have that -- well, we
17 got one here when the State filed one telling me they set an
18 execution date. But it was filed by the Attorney General.

19 MS. STRATTON: No, your Honor, it was filed by us.

11:42:07 20 THE COURT: Oh, by you. But you're a party in this
21 case. You can do whatever you want to in front of Gilmore --
22 Judge Gilmore; but I find that peculiar.

23 MS. LEVIN: It was a really unusual situation where he
24 was unrepresented, and this proceeding was a fairly complex one,
11:42:26 25 and I was aware of the situation and was trying to --

1 THE COURT: Because you'd never talked to him, you
2 couldn't file a notice of appearance on his behalf.

3 MS. LEVIN: I couldn't file a notice of appearance for
4 any number of reasons. I couldn't represent him.

11:42:46 5 THE COURT: Why not?

6 MS. LEVIN: I don't have the capability or the time in
7 that particular proceeding to represent him right now,
8 particularly, when he had an execution date in 30 days.

9 THE COURT: So, because you can't do it properly, you
11:43:03 10 can't do it informally.

11 MS. STRATTON: Your Honor, if I may add, Ms. Levin and
12 I talked about that filing prior to it being filed; and I will
13 tell you my personal concern was -- because the AG's office had
14 informed Judge Gilmore that we were all representing

11:43:30 15 Mr. Williams in this proceeding, frankly, I was concerned that
16 she was going to appoint us to be his counsel; and that would --

17 THE COURT: I'll call her.

18 MS. STRATTON: -- that would -- fortunately, she's
19 already appointed somebody else, but --

11:43:45 20 THE COURT: He needs help.

21 MS. STRATTON: -- that's not something that --
22 Ms. Levin certainly is well qualified, but that is not something
23 any attorney at Baker Donelson is qualified to do, and I was not
24 -- I was in support of the filing because we wanted to make sure
11:44:01 25 that --

1 THE COURT: Why not just file it with --

2 MS. STRATTON: -- no one was going to accidentally
3 appoint us.

4 THE COURT: Why not do a nice little simple document
11:44:12 5 and send it to the Attorney General and ask him, "Please bring
6 this to the attention of Judge Gilmore"?

7 They would have done it, wouldn't they?

8 MR. OTTOWAY: We actually filed the motion for
9 appointment -- oh, I'm sorry.

11:44:30 10 THE COURT: We've been here a couple of hours. It
11 seems longer probably to you-all. But when I ask you a
12 question, I don't want a speech.

13 MR. OTTOWAY: I apologize, your Honor.

14 THE COURT: And do Appellate Courts have time limits
11:44:46 15 on you?

16 MR. OTTOWAY: I have exceeded them many times.

17 THE COURT: No. Well, you know, they give me a button
18 that turns off your microphone. But what I really need is a
19 trap door under where the lawyer stands when they talk too much.
11:45:00 20 But would you -- would the State of Texas have conveyed the
21 information about parallel litigation to Judge Gilmore?

22 MR. OTTOWAY: Yes, your Honor.

23 THE COURT: I think you're obliged to do that even if
24 you'd read about it in the newspaper like I read about the
11:45:16 25 collateral proceeding in the paper, the habeas corpus.

1 And I suspect that most lawyers at Baker Donelson
2 could handle any kind of case. It might take them a little
3 longer than it would a specialist. It also might allow them to
4 be more innovative in their approach to the case, giving it more
5 life, except maybe patents. I think it's illegal to try to give
6 life to a patent case.

11:45:54

7 MS. STRATTON: It probably is.

8 THE COURT: And so, expertise is overrated.

9 All right. Ms. Henderson --

11:46:16

10 MS. HENDERSON: Yes, your Honor.

11 THE COURT: -- do you have anything?

12 MS. HENDERSON: No, I guess not.

13 THE COURT: All right. I just didn't want her to feel
14 neglected.

11:46:26

15 MS. HENDERSON: Thank you.

16 THE COURT: All right. We'll get an order that says
17 roughly what I've just said.

18 All right. Thank you, counsel.

19 (Proceedings concluded at 11:46 a.m.)

20

21 C E R T I F I C A T E

22

23 I certify that the foregoing is a correct transcript
24 from the record of proceedings in the above-entitled matter, to
the best of my ability.

25 By: /s/ Gayle L. Dye
Gayle L. Dye, CSR, RDR, CRR

09-16-2015
Date